No. 7437

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

G. J. WANDTKE,

Intervener and Appellant,

ALMA ANDERSON, WALTER ANDERSON and ALFRED CHRISTOFANI, doing business as Anderson & Christofani,

Libelants,

vs.

THE AMERICAN GAS SCREW "MARY E", her engines, tackle, apparel, etc.,

Respondent,

JOE BORG, FRANK OLAGUES and ARTHUR OAKLEY,

Interveners and Appellees,

FRANK GASSAGNE and A. BENEDETTI,

Interveners and Appellees.

BRIEF FOR INTERVENER AND APPELLEE, ARTHUR OAKLEY.

RESLEURE, VIVELL & PINCKNEY,
Balfour Building, San Francisco,
Proctors for Intervener and Appellee, Arthur Oakley.

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BRIEF FOR INTERVENER AND APPELLEE, ARTHUR OAKLEY.

This case involves the status of one of the men on the "Mary E", a motor scow, so insignificant in size and importance that the official publication of the United States Department of Commerce specifies that her crew shall be *one* in number. One man was all that was necessary for her operation, but inasmuch as

the owner did his own stevedoring the "Mary E" carried three men, one of them, intervener and appellee Oakley, a combined operator, engineer and stevedore.

The question before this court is not, as appellant puts it: "whether the statutory regulations of commerce shall have any force and effect or not", but whether this man Oakley was, in fact, a captain of the scow or merely an operator, engineer or stevedore.

PRELIMINARY STATEMENT.

In order that this court may have before it the correct picture of the parties and the status of their respective claims and contentions, we make the following preliminary statement:

On January 16, 1933, the libelants, Anderson & Christofani, filed their libel in rem for repairs, in the sum of $934.01.

On February 21, 1933, interveners Borg, Olagues and Oakley filed in rem for seamen's wages, claiming, respectively, $366.50, $310.00 and $765.07.

Defaults of all parties were taken and the matter was ordered referred to the Commissioner. Testimony was taken and the Commissioner filed his report, allowing the claims of the parties then before him, according priority to the seamen interveners.

Thereafter, on May 10, 1933, Wandtke intervened with his own claim for $57.95 and an assigned claim of Madden and Lewis for $396.90, both claims being

stated as for repairs furnished at the request of the owners.

On June 20, 1933, Gassagne and Benedetti intervened for $110.49, for repairs furnished at the request of the owners.

Foard-Barstow & Co. did not file, but was allowed a claim for supplies in the sum of $50.00, by stipulation.

The matter was again referred to the Commissioner and a full hearing had, at which Mr. Hutton, counsel for Wandtke and Gassagne and Benedetti, opposed the claim of Oakley, asserting that he was the master of the "Mary E" and not a seaman, and that he had no lien for his wages. The question was submitted to the Commissioner on briefs. The Commissioner, in a carefully considered report, found Oakley was not the master of the "Mary E" and that he was entitled to a lien as a seaman and priority with Borg and Olagues over all other claimants.

From the Commissioner's report, exceptions were taken by Intervener Wandtke in behalf of himself and other persons interested. The exceptions were extensively briefed and submitted to Judge St. Sure, who duly affirmed the report of the Commissioner and overruled the exceptions.

This appeal is taken by Intervener Wandtke alone. The other parties interested evidently feel that they have had their day in court and that the combined decisions of the Commissioner and the District Court, on what is after all a question of fact, have decided the issue.

The boat was sold for $2125.00. Costs of all parties and the claims of Borg and Olagues have been paid, and there remains in the registry of the court the sum of $1146.07. The decision on the question whether or not Oakley was the master of the "Mary E" will determine whether or not this sum shall be applied first, to the payment of Oakley's claim and the balance divided between Madden and Lewis, Wandtke, Ford-Bardstow, Anderson & Christofani and Gassagne and Benedetti, or whether Oakley shall be excluded and the entire balance divided proportionately between the other claimants.

STATEMENT OF FACTS.

Appellant attempts to set forth the facts of this case in various portions of his brief. The only strictly accurate statement in the entire brief is contained in the opening sentence: She "* * * was engaged in carrying cargo between San Rafael and San Francisco". All of the remaining facts as set forth by appellant are matters upon which there was a conflict in the testimony, decided adversely to appellant by the Commissioner after hearing and observing the witnesses and their demeanor on the witness stand, or upon which there is no testimony whatsoever to be found in the record. The statement of facts to be found in the Commissioner's report is amply supported by the record and reads as follows:

> "The testimony reveals that Oakley possessed an operator's license, and, that he had no master's, nor mate's, nor pilot's papers. He

signed no bills of lading, he collected no freight money, he never ordered supplies of any kind during the period he worked on the 'Mary E', he neither hired nor discharged any of the crew. He was usually occupied from 9 to 12 hours per day, his working day was divided as follows: 5 hours were spent in stevedoring, 2½ hours were devoted to steering the vessel, the balance of the time was used in running, attending to or repairing the engines. He ordered some minor repairs; sometimes supervised the repairing of the engine; at times repaired the engine; helped to attach a new rudder and painted the vessel.

On the other hand Oakley started the engines, steered and docked the boat. Under oath he subscribed as master to the enrollment in the Customs House and under oath he signed a report of the accident as master.

By stipulation between proctors it was agreed that the 'Mary E' is described as a vessel of 67 gross tons, 48 net tons, 60.1 feet in length, 25.8 feet in width, 6.2 feet in depth and the crew is called for as one man.

The 'Mary E' was engaged in transporting freight between San Francisco and San Rafael. The crew consisted of two stevedores in addition to Arthur Oakley. Oakley received monthly wages of $160.00, which amounted to $25.00 per month more than the monthly wages of each of the other two men (Oakley testified his wages were higher because he worked longer hours—this extra time was devoted to the maintenance of the engines)."

The above facts, as found by the Commissioner, are sufficient for all purposes. We might add, how-

ever, that the testimony discloses that the reason he was employed was that he was an engineer and that he had a strong back for his "freight breaking" activities; that the only duties he performed, which the other two stevedores did not, was to run and repair the engine; that for the last mentioned work of repairing the engine he received $25.00 a month extra compensation; that after the machinery company refused credit to the owner, Oakley acted as a messenger and took various parts of the engine to the machine shop, because some one had to go to the machine shop to pick up the bill for the work done, to secure the cash from the owner, and to return to the machine shop with the cash before getting delivery of the repaired parts.

I.

THE RULE DENYING THE MASTER OF A VESSEL HAS A LIEN FOR WAGES SHOULD NOT BE EXTENDED BY ANALOGY TO EMBRACE PERSONS NOT HERETOFORE REGARDED AS MASTERS.

There are numerous cases which criticize the rule which denies to the master of a vessel a lien for his wages. The basis of such criticism is the fact that under modern conditions the rule often works injustice and the reasons for the rule no longer exist. The courts, however, have invariably come to the conclusion that although as an original question they would not deny a lien to a master, nevertheless it is not the province of the courts, particularly those of first instance, to change the established law and hold

that in the case of a master, who in fact exercises the ordinary duties of a master at sea, there is no lien for his wages. Discussion of this situation will be found in:

"The Mariner", 298 Fed. 108;
Alabama Drydock Co. v. Foster, 31 Fed. (2d) 394.

We do not urge that the rule in question should be disregarded, but we submit that in view of its injustice, its inapplicability to modern conditions and the expressions of the courts as to the desirability and necessity for change, that the rule should not at this date be extended so as to embrace certain classes of seamen and marine workers, who are not in fact masters, and against whom the rule has never heretofore been applied.

What appellant is here seeking, is to have the rule as to masters extended by analogy to include persons others than masters. We submit that appellant is entitled to receive but little encouragement in this attempt.

II.

THE DECISION OF THE COMMISSIONER AND OF THE DISTRICT COURT ON A MATTER OF FACT SHOULD NOT BE DISTURBED ON APPEAL UNLESS FOR MANIFEST ERROR.

After a complete review of the facts of the case, based entirely upon testimony given in open court, where the Commissioner had full opportunity for observation of the character and demeanor of the witnesses, the Commissioner found, as follows:

> "I find that Arthur Oakley was not clothed with the full responsibilities nor powers of a master but was in fact engineer, stevedore and operator. As such he comes within the category of a seaman."

From the above finding, the Commissioner concluded as a matter of law that the claim of Oakley was entitled to be prorated with the other claims for seamen's wages and was, with them, entitled to be paid first. The District Court confirmed this report.

Although the decree of the District Court is vacated by this appeal, and although it is frequently said that in such circumstances the admiralty appeal becomes a trial *de novo,* at which this court is entitled to investigate the matter anew, nevertheless a new trial on appeal in admiralty does not mean that the Circuit Court of Appeals will in every case inquire into the facts and substitute its own findings and conclusions on the evidence, for those of the two tribunals below.

This matter was succinctly stated in *"The Beaver",* 253 Fed. 312, 313 (9th Cir.), in which this court said:

> "* * * The entire mass of evidence upon which the trial court passed, with the exception of that of two or three witnesses for appellee taken on deposition, was heard in open court, with full opportunity for observation of the character and demeanor of the witnesses, and that evidence on all controverted facts was sharply conflicting. Such a case, notwithstanding a small portion of the evidence rests upon deposition, is to be regarded as well within the reason of the rule that the findings of the trial court should not be disturbed except for manifest error. * * *"

See also:

"The John Twohy", 255 U. S. 77, 65 L. Ed. 511;

The "Mazatlan", 287 Fed. 873 (9th Cir.);

Luckenbach S. S. Co. v. Campbell, 8 Fed. (2d) 223 (9th Cir.).

In the instant case, no question of law is involved since the pertinent rule contended for by appellant is admitted by appellee. The whole issue before this court is the question whether or not Oakley was in fact the master of the "Mary E". The Commissioner and the District Court have found that he was not the master of the "Mary E" but a seaman. This finding should not be disturbed, since no manifest error appears. Hence the conclusion of law that Oakley was entitled to a lien, based upon the finding that he was a seaman, should stand.

III.

PERSONS SIMILARLY SITUATED TO OAKLEY HAVE BEEN HELD SEAMEN AND ENTITLED TO THEIR LIEN.

The case of *"The Atlantic"*, 53 Fed. 607, is squarely in point and on all fours with the one at bar. Quoting the facts and conclusions of the court:

> "The libelant was engaged as engineer on the steam dredge Atlantic, and files this libel in rem for his wages. The respondent admits the service, but denies the lien, on two grounds—first, because this is his home port; and, second, *because the libelant was master of the dredge* * * *.

The wages were $3.50 a day for every day the dredge was at work. The dredge was under the direction and control of the respondent, who made the contracts for her, and gave instructions when she should work. He was not on her, but gave his directions by visiting her in person, or by sending his son-in-law to represent him. *Libelant was the highest officer on the dredge* and directed the fireman and any other hands aboard. *He had no authority to purchase supplies for her, or to engage or dismiss hands aboard of her.* His wages were paid at the office of the respondent in Charleston, either to libelant or to his authorized agent.

It is a puzzling question whether libelant stood in the place of the master or not. He was employed by respondent, looked to him for his wages, was paid by him, was under the control of no one but him; and in these respects came within many of the reasons given for refusing the master his lien. Drinkwater v. The Spartan, 1 Ware, 158; The Eolian, 1 Bliss. 321. On the other hand, he had none of the responsibility or powers of a master, never had any independent authority, did not get continuous wages, but was paid only when his engine was at work. *Upon the whole, I am of the opinion that he cannot be treated as a master of a vessel. He was master in no maritime sense. He was employed because he was an engineer, and his chief duties were to run the engine."*

In *"The John McDermott"*, 109 Fed. 90, 92, the facts as found by the Commissioner and adopted by the court disclose a much stronger case for the contention against the lien than the one presented by the

learned opposing counsel here, since the lien claimant in that case had the right to hire and discharge the help, to order supplies and repairs and had full charge of the men. Nevertheless the court allowed the lien.

"The exception to the allowance of lien to John Shea is on the ground that he was master of Dredge No. 2, and was therefore not entitled to a lien. The finding of the commissioner as to his position is as follows:

'John Shea presented a claim of $200.00 for seaman's wages against the avails of sale of dredge No. 2, and the same was contested on the ground that he was master of the dredge, and not entitled to seaman's wages. It was proved and conceded that *the duties performed by this claimant were the general superintending of the work; that he ran the engine of the dredge, and performed the duties of engineer and fireman and general deck hand on the dredge.* He had the right to hire and discharge the help employed in the gang of dredgers, and to order such supplies as were needed for all hands, and such repairs as were needed to keep the dredge in working order. He received no pay for freights or for any work done by the dredge, except through the owners. The dredge was not capable of being navigated. He lived upon the dredge, and took care of it, and attended to its proper repairs and preservation; but outside and beyond that he had no benefit of position other than that of his crew, except larger pay. He could not pay himself out of any moneys in his hands, for none came to him as the earnings of his craft. The earnings all came to the company, and I find that he was

as much entitled to a maritime lien upon the dredge for his wages as were any of the crew.'

It appears that Shea was licensed as master, and had brought suit in the state court before the libel was filed for wages as such master, and had contracted bills. He 'had full charge of the dredge, attended to all of the repairs, and had full charge of the men'. But the cases cited by counsel to support this exception do not sustain their contention. None of the reasons which are generally given to show that a master should have no lien are present in this case. As is found by the Commissioner, Shea was only a general superintendent of the work, running the engine and performing the duties of engineer, fireman, and general tugman. No freight or other moneys passed through his hands, and the dredge was not capable of being navigated. His case is within the decisions in The Atlantic (D. C.), 53 Fed. 607; McRae v. Dredging Co. (D. C.), 86 Fed. 344; and The Steam Dredge No. 1 (D. C.), 87 Fed. 760. The exception to the allowance of the Shea claim is overruled."

In *McRae v. Bowers Dredging Co.,* 86 Fed. 344, 348, 349, the court said:

"I find no difficulty in pronouncing in favor of the engineers, firemen, deck hands, and captains who worked on board of the dredgers. They have maritime liens for the balances due to them for wages. *The captains were not clothed with the authority of masters, but were simply foremen in charge of the working crews. Therefore the rule that the master of a vessel has no lien for wages does not apply to them.* * * *

> The claims to liens for wages and for supplies and repairs are founded, not only upon the general maritime law, but also upon a statute in force in this state * * *."

In *"The Pauline"*, 138 Fed. 271, 272, the court, in holding the navigators of excursion steamers not to be masters for the purpose of a lien, adopted the following finding and decision of the Commissioner:

> "As to the last question, the testimony before me shows that Corbett, the owner of the boats, had been in the saloon business and that he held no license either as master or pilot, nor had he any knowledge of navigation. The boats were excursion steamers and employed in running from Harlem River to Classon's Point, Long Island, where a summer resort was maintained by one Cowan who had made a charter of the boats from Corbett. The boats did no freight business and all of the fares of the passengers were collected either on the boat or on the wharf through the sale of tickets by Cowan or his employees. Corbett, on the other hand, hired and discharged the crew and bought all supplies, coal, waste, oils, &c. for both boats, as well as attending to all business with Cowan. *Simons and Purnell had no duties other than the navigation of the boats. Both held master's and pilot's licenses.* Corbett appeared in the custom house papers as master of the 'Pauline' and one Kiernan whom Purnell succeeded as master of the 'Young America'. * * *
>
> I therefore find that Simons and Purnell were not masters but were pilots and are therefore entitled to their lien."

In *"The A. H. Chamberlain"*, 206 Fed. 996, 998, the court, holding the captain of a scow who performed the duties of a deckhand was not the master for the purpose of a lien even though the owner's representative set forth the facts and law as follows:

> *"The libelant signed himself as captain, receipted bills of lading, and generally acted as the owner's representative in whatever was necessary to be done upon the scow's trips.* In some instances *he accepted freight money and applied it to his wages account. In other respects he was but a mere deckhand, and in fact during the greater part of the time was the only person employed upon the scow* for everything which had to be done. *Such a man would not be a master,* and it would seem could have a lien for wages as a general proposition. * * *
>
> (2) Section 4612 R. S. (U. S. Comp. St. 1901, p. 3120), defines a master to be 'every person having command of a vessel of a citizen of the United States', while 'Seamen' are 'persons employed to serve in any capacity on board the same'. These definitions are for the purposes of 'Title 53' relating to 'Merchant Seamen'. *But by analogy a boat having no 'seamen' required to sign for the voyage, and hence having no master, would still be the subject of a maritime lien by a wage-earner working thereon,* unless the boat be a canal boat or local craft not subject to admiralty jurisdiction. Orleans v. Phoebus, 36 U. S. (11 Pet.) 182, 9 L. Ed. 677.
>
> *But the captain of a scow or barge, who does the work of a deckhand, and does not have the right to control the vessel's movements nor em-*

ployment, and can act only as agent, in the sense that any sailor might act under specific direction of his captain, is not a master, and does come within the provisions of the section."

The above quoted case seems to differ from the one at bar only in so far that Oakley's position is much stronger than that of the one man captain and crew of the scow.

In *"The Hurricane"*, 2 Fed. (2d) 70, 72, affirmed 9 Fed. (2d) 396, the court said:

> "In the libel filed on behalf of J. W. Mairs and Edward S. Field, liens for wages are claimed on behalf of Mairs for services as dipper tender on the dredge, and on behalf of Field as chief operator in charge of its operation. I have no doubt that the Hurricane, being engaged in the work of deepening channels in navigable water, an occupation incident to navigation, is a vessel within the meaning of section 8392, Comp. Stat., and that Mairs and Field, being employed in the operation of the dredge, are seamen entitled to liens for their wages. *While Field was known as 'captain', he was so designated merely because he was the foreman in charge of the work* under the direction of the superintendent of the Canal Construction Company. He was not a licensed master."

IV.

"ADMIRALTY DEALS WITH THINGS, NOT WORDS"—HENCE APPELLANT'S CONTENTION THAT OAKLEY HAVING TAKEN THE MASTER'S OATH AT THE CUSTOMS HOUSE IS ESTOPPED FROM ASSERTING THAT HIS CAPACITY IS THAT OF A SEAMAN IS ERRONEOUS.

Appellant maintains, with much vigor, that Oakley having signed the master's oath, he is estopped from denying that he was the master and from claiming a lien for his wages as a seaman.

There was also some testimony to the effect that certain persons addressed Oakley as "Captain" and that he did not raise any objection. There was also some testimony to the effect that he told people that he was the master and particularly some of the people at Madden & Lewis' shipyard. There is in the record evidence to the contrary. Oakley explained, if we remember his testimony correctly*, that many seafaring men are addressed as "captain", whether or not entitled to that appellation. If he was so addressed, the salutation was accepted by him in the same spirit that many attorneys are addressed as "Judge", or many elderly gentlemen residing in the Southern States are addressed as "Colonel".

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*THIS APPEAL SHOULD BE DISMISSED FOR FAILURE OF APPELLANT TO COMPLY WITH THE RULES OF THIS COURT.

We are unable to give page references to the apostles for the reason that no apostles have been printed. At least no copy has been served on appellee. Appellee is also handicapped in the matter of quoting or referring to testimony, as the trial of this matter took place many months ago and even the typewritten record is not available to us since the small amount involved in this case did not justify the expenditure by a seaman of the money necessary to secure a copy of same. We submit that the appeal should be dismissed on the grounds that the record has not been printed in compliance with the rule and on the further ground that without application for or leave of court, appellant has failed to print his brief. It would be no slight hardship if certain litigants and their counsel were privileged to dispose with the printing of the record and the printing of briefs if the rule is to continue into effect as to other litigants and their counsel.

In the case of *The "Imogene N. Terry"*, 19 Fed. 463, the libelant in his libel described himself as master of the sloop "Imogene N. Terry". As a matter of fact, the libelant in that case was nothing more than a seaman in charge of the "Imogene N. Terry", a tender to another vessel, the "Frank C. Barker". It was contended that the libelant, having described himself as master, and being in charge of the "Terry", was not entitled to a lien. The court, however, held that because "he earned no freights and no money passed through his hands from the earnings of the vessel", he was not master of the vessel and that the actual fact would control and not the description of himself by the libelant.

The court very aptly puts the matter as follows:

> "In the above libel the libelant, with some self-complacency, describes himself as master of the sloop Imogene N. Terry. *But courts of admiralty deal with things, and not with words.* If the proofs show that he is in fact an ordinary seaman, under the control of the master, his calling himself the captain ought not to hinder him from invoking the seaman's remedy for the collection of his wages."

In the case of *"L'Arina" v. The Exchange,* 14 Fed. Cas. 8088, the libelant had signed as master of the brig "Exchange" at the Custom House in order to enable the vessel to clear. The court, however, held that this did not constitute him the master, if he was not such in fact. The court said:

> "At a summary hearing of this case, a plea to the jurisdiction of the court was urged, because

> the actor being master of the vessel could not sue in the admiralty or make her liable for his wages, his remedy being against the owners only. It appeared in evidence that the actor was merely called master of the brig, but never was considered so, or acted as such, except by lending his name to clear the vessel at the Havanna. * * *
>
> In considering the case, the court decided that the actor never was captain in fact, and therefore not barred from suing here."

To a similar effect see *Peterson v. "The Nellie and Annie"*, 37 Fed. 217, where the person on the ship's papers as master was held entitled to a lien where it shows that he was not the master but another occupied that position in fact.

Appellant makes the contention that a vessel cannot run without a statutory master, and hence, Oakley having signed at the Custom House as master, he became master for all purposes. As a matter of fact, the statutory law of the United States is perfectly clear to the contrary on this subject.

U. S. Code, Title 46, Sec. 223, provides:

> "Minimum number of officers. The board of local inspectors shall make an entry in the certificate of inspection of every ocean and coastwise seagoing merchant vessel of the United States propelled by machinery, and every ocean-going vessel carrying passengers, the minimum number of licensed deck officers required for her safe navigation according to the following scale:
>
> *No such vessel shall be navigated unless she shall have on board and in her service one duly licensed master.* * * * *Provided,* That *this section*

> *shall not apply to* fishing or whaling vessels, yachts, or *motor boats as defined in Chapter 16,* or to wrecking vessels."

Therefore, while it is true that no ocean or coastwise seagoing merchant vessel of the United States propelled by machinery, or ocean-going vessel carrying passengers, shall be navigated unless she has in her service a duly licensed master, it is expressly provided that motor boats, as defined in Chapter 16, may be navigated without a master. The "Mary E" was a motor boat within the terms of the exception, since she was less than 65 feet in length, and not a tug boat or tow boat propelled by steam. The appropriate sections with regard to motor boats are as follows:

> *U. S. Code,* Title 46, Section 511:
>
> "'Motor Boats' defined; inspection. The words 'motor boat' where used in this chapter shall include every vessel propelled by machinery and not more than sixty-five feet in length except tugboats and towboats propelled by steam."

> *U. S. Code,* Title 46, Section 515:
>
> "* * * All motor boats carrying passengers for hire * * * and no such boat while so carrying passengers for hire shall be operated or navigated except in charge of a person duly licensed for such service by the local board of inspectors. * * * Provided, That motor boats shall not be required to carry licensed officers, except as required in this chapter."

The cases cited by appellant on this subject are not in point.

In *The "Ticeline"*, 221 Fed. 409 (appellant's typewritten brief p. 3), there was no question involved as to a maritime lien. The case involved a collision and it was sought for the purposes of the fellow servant doctrine to hold the pilot in charge at the time of the collision as master. The vessel had in fact a master, who was named on the certificate of registry of the boat. The language of the court applicable to a question whether a pilot could be master as well as the actual and registered master cannot be applied to a situation such as is involved in the instant case.

In *The "Chicago"*, 235 Fed. 538 (appellant's typewritten brief p. 3), it was held that the libelant, who was engaged merely for the navigation of the barge "Chicago" and who performed the ordinary duties of master of the barge, was in no sense a master, who could not have a lien for his services. As a matter of fact, the claimant and owner of the vessel was registered as her master and the court says that if any one was the master of the barge, it was the owner, whose name appeared on her document. This case simply held that the libelant was not the master because another person was registered as the master. It does not logically follow that one who is not in fact the master, becomes such simply because his name is signed at the Customs House as master.

The forms at the Customs House are designed for vessels which actually have masters. They are not adapted to the situation of a small scow which does not require a master. Oakley signed as master simply

because there was no one else to do so and the Customs House form had to be filled in in some way.

In *The "Vandercook"*, 24 Fed. 472 (appellant's typewritten brief p. 4), the vessel was a duly enrolled seagoing tug. The libelant, although he describes himself as mate, was *in fact* the master.

In *Adams v. "The Wyoming"*, 1 Fed. Cas., Case No. 71, there was no question but that the libelant was in fact the master. Incidentally, he appeared on the ship's papers as master.

The case of *Dubuque,* 2 Abbott's U. S. 20 (appellant's typewritten brief, p. 7) may be similarly distinguished.

All that the cases cited by appellant hold is that where a vessel has in fact a master, the question as to who is master will ordinarily be determined by the name which appears in her document. To make the situation perfectly clear, let us assume that the "Mary E" was the class of boat which carried a master. That Oakley was originally the master and signed the master's oath. Thereafter, another master was employed and Oakley put on as engineer. Would it be seriously contended that because his name still remained on record at the Customs House that the engineer and not the real master was master and that the engineer would have no lien.

V.

APPELLANT'S CONTENTION THAT OAKLEY WAS PERSONALLY RESPONSIBLE FOR THE REPAIR CLAIMS AND HENCE COULD NOT ASSERT A LIEN TO PREJUDICE THE OTHER LIEN CLAIMANTS, BEGS THE QUESTION AND IS OTHERWISE UNSOUND.

Appellant contends that Oakley was Captain and ordered the repairs, hence under *Section 2382 of the California Civil Code* he was personally liable for the bills. This contention begs the question as to whether or not Oakley was Captain, the entire issue in the case, and assumes that he ordered the repairs.

If our memory serves us correctly the testimony in this case is that certain minor repairs were ordered by Oakley after the owner was on a cash basis and could not get credit. Even then Oakley acted more in the nature of messenger for the owner or as engineer. Naturally these repairs could not be the ones sued upon as they were paid for in cash.

Any testimony as to other repairs being ordered by Oakley was contradicted. Moreover, the libels in intervention all show on their face that the repairs were furnished *at the request of the owners,* and the suits were against the vessel not against Oakley.

We will not burden this court with a further discussion of this point. If Oakley was not the master the point fails, since there could be no personal responsibility. If he was master then he would have no lien, so that a determination as to his personal responsibility is unnecessary.

CONCLUSION.

It is respectfully submitted that Oakley was not master in fact; that he was entitled to a lien; that the findings of the two lower tribunals, not having been shown to be manifestly in error, should stand, and that the decree should be affirmed.

Dated, San Francisco,
September 1, 1934.

Respectfully submitted,
RESLEURE, VIVELL & PINCKNEY,
Proctors for Intervener and Appellee,
Arthur Oakley.